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Mistress at Law - The Case of an Unprotected Dependant

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"The institution of marriage has long been on a slippery slope. What was once a holy estate enduring for the joint lives of the spouses, is steadily assuming the characteristics of a contract for a tenancy at will". (Lord Russel of Killowen in FENDER v St. John-Mildway 1938 A.C 1; 34-5).

Introduction

"The social judgment(s) of today on matter of 'immorality' are as different from those of the last century as is the bikini from a bustle".¹ This remark was made in the course of an Australian property case, the parties to which a man and a woman, had been living together as cohabitantes. A condition of their "shacking-up" was that the man - a certain Andrews - agreed to transfer ownership of the house in which they lived to the woman - a certain Mrs Parker - on the condition that if she returned to her husband, she would re-transfer ownership of the property to Andrews. After the

ownership had been transferred to her, cohabitation ceased and Mrs. Parker began to see more of her husband who, eventually, moved into the house. Mrs Parker then asked Andrews to leave, informing him that he was not the first man who had been taken for everything he had. Andrews left but sued to recover title to the property. The court ordered Mrs Parker to re-transfer the title to Andrews and remarked that even if the agreement between Andrews and Parker had been based on an immoral consideration, the immorality had not been such as to deprive Andrews of his remedy.

Cohabitation is of course not special to Australia. It is a world-wide phenomenon and has been with us since time immemorial. By cohabitation we mean a situation where a man and a woman (and their children, if any) are grouped together under family-like conditions, in other words, an informal type of living together but one which has all the essential social features of a family unit. In Botswana, today, hundreds live in this type of situation, and openly so. Cohabitation has become common place and accepted, or at least tolerated by society. It is a phenomenon occurring in all educational and social classes. Disapproval if felt, is seldom voiced.

But Roman-Dutch law still frowns upon these relationships. It is true that the law encourages couples to marry rather than to live together without the benefit of the marriage formalities. In this article we shall try to explore the law applicable to cohabitation, but this statement should not be understood to mean that there is a law, like the law of husband and wife, applicable to cohabitation (Pearl 1978:252; Hahlo 1972:331)². We will concentrate on the law applicable where a mistress seeks to claim a right in property owned by her lover during or after the death of the latter and the legal provisions for the support of dependant mistress. It will be argued that the law in this respect is inconsistent, unjust and at the most needs overhaul.

It must be noted from the very beginning that the mere fact that a relationship exists between a man and a woman, or that they are living together, does not in itself give

rise to any legal consequences. In Botswana to which the article will refer the common law still does not recognise the rights of a mistress but the legislature has gone a step further towards the direction of recognising such rights. [Workmen's Compensation Act, 1977].

Common Law

The common law does not recognise and never recognised a woman who is merely living with a man as his wife in any sense. As it was succinctly put by Lord Devlin, "A man and a woman who live together outside marriage are not prosecuted under the law but they are not protected by it. They are outside the law. This union is not recognised, no legal obligation is implicit in it and an express obligation will not be enforced by the law" (Lord Delvin, 1965:77). Though Lord Devlin was writing about English law, the position is generally similar under Botswana law. The courts are still reluctant to confer directly or indirectly on an unmarried woman or man legal rights or duties associated only with the status of marriage. The legal position of the unmarried couple to a large extent is dictated by the prevailing policy that marriage should be encouraged.

That the law and the state encourage marriage is beyond dispute. State encouragement exists in the tax law, for instance. (Molokomme, 1984:74). Thus, there is no recognition in tax law of the relationship outside marriage. The law does not care whether the relationship is stable or transitory. This is but one instance of the injustice of the common law in respect of the unmarried couple. There are quite a lot of disadvantages the mistress suffers in law. A mistress has no right to claim maintenance from her lovers. No right of inheritance exists between the couple. On the other hand a husband is under a legal duty to support his wife. If he fails to do so, she can apply to a court for a maintenance order. A mere cohabitee has no such right against her lover. It does not matter how long the relationship has endured and

what contribution she made to the common household. The only remedy available to her is to bring the relationship to an end. The reason, it is argued, for not conferring privileges or advantages on the mistress is that it will be morally and socially unjust. She chose not to assume the duties of marriages.

"... A man and woman who, for good reason or bad elect to live in concubinage rather than marry, make a deliberate choice and cannot complain if the consequences of marriage do not attach to their union. To use a well-worn cliché, they cannot 'have their cake and eat it'. I am not persuaded that there is a case for creating a special status of concubinage, either equivalent in its effect to a valid marriage or positioned somewhere between a marriage and passing, promiscuous relationship." (Hahlo 1972:331)³

Thus according to Prof. Hahlo there is no half-way station. Either the parties choose to marry or the consequences of marriage do not attach. With respect to Prof. Hahlo, his argument begs the question. First the relationship is not necessarily sexually promiscuous. Sexual intercourse if anything is simply a physical bond between the participants in the affair rather than the basis of the affair. After all the mistress and her lover are not sexual renegades or necessarily rebels against the conventional social order. The participants may choose not to marry for other reasons. One of the parties may be afraid of marriage because of prior failures or anticipated failures and the usual domestic rows. She/he may feel unprepared and unwilling to assume the role of wife or husband.

Another reason commonly advanced against recognising the duty of support is that the support will be payment for sexual services rendered. The reasoning in this argument is otiose. A wife, whether she renders her conjugal duties or not, will still

be entitled to support from the husband. Whether she loves the husband or she married him for his wealth does not make any difference in law. But in most cases the mistress' love for her male partner is unaffected by his ability to provide her with financial support, though the man's wealth may make him a desirable lover. As such the pejorative connotation of support being payment for services rendered is misleading. For the mistress, the supposed deviancy or wrongfulness of the relationship is mitigated by the fact that in most cases it is a love affair.

Prof Allott argues that the mistress enjoys certain freedoms not conferred on the wife. By virtue of these freedoms the equation is balanced out. Under the common law, he argues, the wife's property became in effect that of the husband or at least fell under his control. If she was only a concubine or mistress she will be free to keep her property separate from that of the man thus retaining some of her economic independence. At the end of the relationship she can walk out with what she owns. He concludes that "the mistress, concubine or long term partner has her freedoms: she can leave at a moment's notice, without order of any divorce court: she owes no duty to maintain or assist her "husband" financially such as it is cast on the wife"(Allot 1984:262). This argument overlooks many things. It overlooks the emotional attachment and moral obligations involved. The parties to such a relationship still feel a sense of grievance when it comes to an end. Further what property does she own? While such a relationship still lasts, just like in any marriage, there is nothing like "yours" or "mine". Everything is "ours". What if one of the parties was the sole breadwinner and the other stayed home to run the common household and looked after the children of the relationship? Can she be allowed to quantify these contributions? It is unlikely that this will be allowed. So, to talk of the property she owns will be unfair to such a party.

More seriously, widows and other dependants are entitled to bring a dependant's action for loss of support where their breadwinner has been killed by the negligence

of a third party. All they need to establish is their dependency and the legal duty owed to them by the deceased before he died. Unfortunately an unmarried woman cannot benefit or claim anything against a person who wrongfully kills her lover. (Van de Vyver 1982:130; Dhlamini 1984:39). The fact of the matter is that the mistress satisfies most of the delictual requirements for a dependant's action for loss of support. The mistress's action has been defeated by such arguments like lack of duty of care owed to the plaintiff, public morals and some other grounds of policy decision especially by the attitude of the church towards the sanctity of marriage.⁴ Where the relationship is adulterous it could not be enforced. Others argue that the interest the mistress seeks to enforce must not only be legitimate but also juridically protected. A mistress is not defeated because her action was illegitimate but because she had no rights against her lover and hence no rights against the third party who negligently caused his death. The position is arbitrary, and unjust.

A widow of one-day marriage can sue the third party for the negligent death of her husband. Further in the English case of *DYSON HOLDINGS v FOX* (1975) protection was afforded a woman who had lived with a man for 40 years as man and wife without being formally married. It would therefore seem that in England now, the action is available where the relationship was long and durable. But why, one may ask, should a mistress who has 40 years old relationship with a man, and a widow of a one day marriage have legitimate interest and one who has a shorter, but perhaps emotionally stronger relationship be deemed not to have one? The answer cannot be found in logic but rather only in policy considerations.

Whatever the policy considerations may be, it is suggested, that the best answer should be to use factual dependency and the quality and substance of the relationship as the criterion. The onus, therefore, should be placed on the plaintiff to establish the relationship between her and the deceased, and further prove actual loss of support. Where the relationship was casual and insubstantial the action should fail. That is the

support relied upon should be real and substantial.

Can the parties contract that the man would support her? Will such a contract be enforceable in law? This is an open question. But the odds are in favour of its nonenforcement. Our standard rules of immorality cover both contracts having as their objects sexual immorality and contracts which indirectly promote sexual immorality (Christie 1979:349-51). Thus it is likely that a promise by a man to pay a woman money if she becomes his mistress is illegal. As Lord Wright observed in *FENDER v St. JOHN-MILDWAY* 1938

"The law will not enforce an immoral promise such as a promise between man and woman to live together without being married, or pay a sum of money or give some other consideration in return for immoral association" (42).

Therefore the mere fact of cohabitation gives rise to a rebuttable presumption of immoral consideration. It must further be noted that the law treats a contract between man and mistress the same way as a contract made by a woman for the purposes of prostitution.⁵

In *FENDER v St. JOHN-MILDWAY* Lord Wright indicated that such a contract might not be void if it discharged a moral obligation. Therefore where the contract involves house-keeping and caring for the children the contract will be enforceable. Our legal system imposes not only a moral duty also a legal duty on the father of illegitimate children to support them. Thus the legal duty to support the illegitimate children can

be coupled with a moral duty to support their mother. In England Lord Denning (while Master of Rolls) stated that:

"(The) man had a moral duty to provide for the babies of whom he was the father. I would go further. I think he had a legal duty towards them. Not only towards the babies. But also towards their mother. She was looking after them and bringing them up. In order to fulfill his duty towards the babies, he was under a duty to provide for the mother too". (Tanner v Tanner 1975).

An almost similar conclusion was reached by the courts in South Africa in the 1920s. In THOMPSON v MODEL STEAM LAUNDRY Mr and Mrs Thompson were married with two children. On their divorce Mrs Thompson was awarded custody of the daughter and the custody of the son was awarded to Mr. Thompson. Mr. Thompson kept the son in the house occupied by the mother and fed him there. He also had meals and occupied the house during the daytime. But he took no part in the management of the house. Mrs Thompson performed all functions of manageress. "To all outward appearance (Mr Thompson) comported himself exactly in the same manner as an ordinary married man who lived with his wife and children in this house." Mrs Thompson took laundry to the respondents and pledged the defendant's credit. In an action to claim payment for the laundry services Mr. Thompson pleaded that Mrs Thompson had no authority - actual or implied - to bind his credit. Mr Schreiner⁷ for the respondent argued that where a man employed his or any woman with whom he cohabitated to manage the joint household, there is a rebuttable presumption of implied agency. Though the court rejected this argument it nonetheless held Mr Thompson liable for the payment of laundry services. It was held that since he kept his son in the house and Mrs Thompson maintained the house as well as the children to whom he owed duty of support he was liable for all expenses (household necessities) incurred in that regard.

This case together with the previous one illustrates that the existence of the children is a factor which will influence the court in enforcing a contract between a man and his mistress. Whether such a contract can be implied is not yet clear.

As mentioned above cohabiting lovers have no rights of inheritance between themselves. If the "husband" dies without leaving a will the "wife" cannot inherit by intestate succession. Close and distant relatives will inherit to her exclusion. The only benefit she is entitled to is where the man provided for her under a will. Because of the freedom of testation in our law a man is free to leave his property to whoever he chooses. (Sanders 1983:18). This has now been limited by statute. In the past the husband could leave all his property to his mistress to the exclusion of the wife. A wife who had been disinherited by her husband in favour of his mistress had no remedy even if she was left in penury and had done nothing to deserve such treatment. But this testamentary benefit in favour of the mistress though allowed is tainted. Under our law a person who woos testamentary benefits by the blandishments and requests is presumed to do so out of self-interest and not out of malice towards the person upon whom the property would have devolved. The latter has no right of action against the former. But as regards a mistress this provision has not gone untarnished. It has been marred by some insinuations such that it sometimes stinks even when the mistress wins. In *MILLWARD v GLASER* 1949 the widow contended that the testator made the will in the mistress's favour "as a reward for her living in adultery with him". This averment, of course, has no effect in law whatsoever but achieves the sole aim of tarnishing the disposition.

Hahlo (1972:321) has argued that when a man and a woman have lived together without being legally married, the woman cannot be heard to complain if she cannot succeed to him ab intestato. "After all" he argues, "there is nothing to preclude him from making a will in her favour, and if he fails to do so, the conclusion may legitimately be drawn that he did not want her to inherit". Certainly there is force in

this argument. But the point Hahlo omits to discuss is what will happen where the man purports to leave the property to his lifelong mistress by will, which later turns out to be invalid for one reason or the other.⁸ Our law in that case is that the testator would have died intestate. Can the mistress in such a situation inherit ab intestato? Obviously the intention of the testator is clear. By attempting to draw a will he intended to provide for his mistress. Therefore in such a case there is no reason in logic or in law why the relatives should inherit to the exclusion of the mistress. As Hahlo pretty well knows, it is easy said than to make a will. A benevolent testator may be frustrated by the technical rules of the law of testate succession.

So much for the work of the common law. Parliament has since stepped in. Statutory innovation has recently granted the mistress certain limited legal rights previously associated only with the status of marriage.

Statutory Provisions

The most important statutory innovations are to be found in the WORKMEN'S COMPENSATION ACT. Before this Act was passed, various statutes were enacted to improve the position of other underprivileged groups within the family setting, but nothing was done for the mistress. For example in the past a wife who had been disinherited by her husband in favour of his mistress or a third party had no remedy. Now the position is changed by statute. First of all she is entitled to a specific share of the deceased husband regardless of whether he leaves issue or not. Should the husband die without providing for her, she has a right of application for maintenance and can claim financial provision as it would be reasonable in the circumstances. (Succession Act: S41). Mistress has no such claim. Other dependents too, including an illegitimate child, can claim maintenance where they were not provided for in the will of their deceased father.⁹ Of course this law is applauded in certain quarters for failing to provide for the mistress.

It is argued that the widow and children would feel a strong sense of grievance as they see the mistress sharing in the estate.

The introduction and enactment of the Workmen's Compensation Act certainly did for the mistress what the Married Person's Property Act and Succession (Rights of the Surviving Spouse and Inheritance Family Provisions) Act did for the married woman. It conferred certain rights on the mistress. In its definition of a dependant for the purposes of claiming compensation for the death of a workman the mistress is included.

Section 2(2) provides that unless the context otherwise provides dependant "in relation to a deceased person, means those members of his family who were wholly or in part dependent upon his earnings at the time of his death, or would but for the incapacity due to the accident have been so dependent ..." It goes on to state under paragraph (ii) that

"Where an application being made by a woman in accordance with regulations under this Act the court is satisfied that - (a) such woman and the deceased were living as man and wife at the time of the accidents and (b) such woman was wholly or partially dependent on the earnings of the deceased at the time of his death, or would but for the incapacity due to the accident have been so dependent, the Court may, in its absolute discretion, order that such woman be deemed to be a dependant for the purposes of this Act".

The operating word there is "deemed". The mistress is not a dependant as such but may be "deemed" so. Never the less despite its sexist terminology, the Act has done for the mistress what the common law and other Acts have failed to do over the years.

It has made significant strides towards recognising the rights of the mistress vis-a-vis her lover where he is killed or injured at work. For the first time the mistress is put in a position traditionally reserved for a married woman. Probably we are here witnessing the birth pang of the recognition of a relationship outside marriage. The position of the mistress is greatly ameliorated. Whether a mistress who has been kept side by side with the duly married/wife will be able to compete for compensation with the widow is not clear. In the English case of *SCHAEFER v SCHUMAN* 1972 the court held that a wife who has been unfairly dealt with by her husband in his will can apply to court for maintenance out of the deceased estate and her claims under an award by the court for maintenance take precedence over whatever rights the mistress may have under the will. By analogy, therefore, it would seem the wife's claim should take precedence. After all the courts, in the exercise of their discretion, would be unlikely to give the mistress the "privileges of widowhood when she did not or would not assume the duties of marriage" (Samuels 1976:184).

To return to the Act, dependancy in this Act is not based on any legally recognised duty. It would seem from the reading of the Act that factual dependancy is sufficient. Otherwise, there will be no good ground on which to base the action of an illegitimate child let alone the mistress. Whether a claimant is a dependant is a matter of fact to be established by the ordinary rules of evidence. But where, however, in the discretion of the Minister the fact of dependancy cannot easily be established or can be established with some undue hardship to the claimant the Minister can dispense with the need for proof if certain requirements are fulfilled. A statement or allegation of dependancy and the degree of dependency of the claimant if signed by the District Commissioner or commissioner of oaths in the district in which the claimant resides shall be prima facie proof of the facts as alleged. It does not matter whether such District Commissioner or commissioner of oaths is resident in or outside Botswana. The signature of such officer shall be admitted without further proof. It can only be challenged if the Minister "has reason to doubt the genuineness thereof."

Lastly it must be noted that whether the woman envisaged by section 2(2)(a) and (b) is actually a dependant, and thus entitled to a claim for compensation is left to the discretion of the court. It is submitted that the demands of justice would compel the courts to exercise the discretion in favour of the mistress. To exercise the discretion against the mistress will be contrary to the spirit of the Act. The Act was designed to protect the workman as well as his dependants.¹⁰

Conclusion

We have reviewed the law relating to relationships outside marriage. It has emerged clearly that the law, especially the common law, does not attach any legal consequences to such relationships. There are no legal rights even between the parties inter se. The only limited recognition at common law is where the relationship has resulted in the birth of a child. The legal duty obtains to the child and not the mother. Only recently has the legislature come in to fill the lacuna. Though this is a step in the right direction it is not, in my humble submission, sufficient since it still leaves the mistress to the discretion if not the mercy of the courts. Probably the time has come to re-examine our social and legal attitudes to marriage, cohabitations and the family. Concubinages or relationships outside marriage are a reality and we cannot afford to ignore them any more. We should re-examine why we have historically favoured marriage rather than informal relationships. The imposition of rights and responsibilities between cohabitantes will help curb other social malaise. It will reduce or prevent "illegitimate" births. Certainly, social morals have changed over the past decades, the law should follow.

NOTES

1. Judge Stable in *Andrews v Parker*, (1973) Qd R93 at- 104.
2. In its widest sense concubinage embraces three different forms of relationship: 1) that of a man and a woman living in some sort of matrimonial situation in a common home; ii) that of transitory relationships and iii) that of a woman kept in a state of dependency, perhaps in a separate house. The last one was the most common in many countries over the ages. For literature generally see D. Pearl, "The legal Implications of Relationship outside marriage" 1978 C.L.J. 252; H.R. Hahlo, "The Law of concubinage" 1972 SALJ 321; South African Law of Husband and Wife (1984).
3. The word mistress is defined in the Oxford Dictionary, among others, as "woman having regular sexual intercourse with one man to whom she is not married". In the context of this article it will be used to mean a (wo) man who lives with a (wo) man as if (s)he were his wife/husband without being lawfully married to him/her. To be a mistress was once respectable. Having lost its respectability if not reverential significance, the term mistress came to mean a woman installed in clandestine ways by someone of substance, normally married, for his intermittent sexual enjoyment. Whether this class of woman still exists is debatable. Some writer prefer to call this class of woman "the kept woman" - EDNA SALAMON, *The Kept Woman: Mistresses in the 1980's* (1984).
4. Public moral, it must be noted, is elastic and dynamic. But the courts tend to treat public moral as if it is stagnant and never changes. What was against public moral ten years ago is not necessarily so today.
5. Marriage still occupies a place of pride in our society even today. Whatever act is likely to interfere with a marriage institution will not be countenanced by the courts. *Kuhn v Karp*, 1948(4) S.A 825; Christie, *Law of Contract* (1979) p349-51.
6. Thus in *UPFILL v WRIGHT*, 1911 1 K.B. 506 the landlord failed to recover the rent due for the lease of a house which was used as a "lovenest" by a woman and her lover. In dismissing the action the court said: "The flat was let to the defendant for the purposes of establishing her to receive the visits of the man whose mistress she was and to commit fornication with him there. I do not think that it makes any difference whether the defendant is a common prostitute or whether she is merely the mistress of one man, if the house is let

to her for the purpose of committing the sin of fornication there. That fornication is sinful and immoral is clear", p510.

7. It is noteworthy that Mr..O.D. Schreiner came to be one of the most prominent judges in South Africa, as well as the Court of Appeal of Botswana. His son now sits in our Court of Appeal.
8. A will may fail for various reasons e.g if it does not comply with the formalities prescribed by the Wills Act CAP.31: 04 of The Laws of Botswana.
9. An illegitimate child, even at common law, could claim maintenance from the estate of the deceased natural father if the estate is capable of doing so. *CARELSE v ESTATE De VRIES*, 23 S.C. 532.
10. In introducing the Bill in Parliament the Minister of Home Affairs stated:

"We have long realised that the 38 year old law has aged with time to a point where with our recent developmental achievements we still lag very much behind some social obligations to our workers. "Hansard, vol. 59, 1977 p110. The Act, to repeal Workmens Compensation Proclamation CAP.149 of 1939, was otherwise passed without any debate.

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